Filed 11/5/10 P. v. Martinez CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ISAIS URIETA MARTINEZ, Defendant and Appellant.	G041828 (Super. Ct. No. 04CF3228) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed as modified.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Garrett Beaumont and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

A jury convicted Isais Urieta Martinez of one count of second degree murder (Pen. Code, §§ 187, subd. (a), 189) and one count of street terrorism (*id.*, § 186.22, subd. (a)) (further code references are to the Penal Code unless otherwise noted). The jury found true the special circumstance allegation the murder was committed for a criminal street gang purpose (*id.*, § 190.2, subd. (a)(22)), the intentional discharge of a firearm enhancement (*id.*, § 12022.53, subd. (d)), and the criminal street gang enhancement (*id.*, § 186.22, subd. (b)(1)).

The trial court sentenced Martinez to a term of 40 years to life as an indeterminate sentence and 2 years consecutively as a determinate sentence. The sentence consisted of a determinate middle term of two years for street terrorism, a consecutive term of 15 years to life for murder, and another consecutive term of 25 years to life for the firearm enhancement.

The same jury found Martinez's codefendant, Arnoldo Cossio Rivera,[1] guilty of one count of involuntary manslaughter as a lesser included offense of the charged crime of murder, and one count of street terrorism. The jury found true the allegation the involuntary manslaughter offense was committed for the benefit of, at the direction of, or in association with a criminal street gang. Appellant Rivera and Martinez filed separate notices of appeal, and Appellant Rivera's appeal is case No. G041517.

We order the judgment against Martinez modified to impose concurrent sentences on the determinate and indeterminate terms, order the abstract of judgment for the indeterminate term modified to reflect actual custody credit, and vacate the jury's true finding on the special circumstance murder allegation. We affirm the judgment, as modified, in full.

[1] To avoid confusion with codefendant Kenneth Rivera (who is not a party to this appeal), we will refer to Arnoldo Cossio Rivera as Appellant Rivera.

FACTS

Appellant Rivera and Martinez were members of the Latin Boys, a criminal street gang in Santa Ana. During the afternoon of September 17, 2004, Appellant Rivera was driving his Ford Explorer with Martinez riding in the rear passenger seat and Kenneth Rivera, another Latin Boys gang member, riding in the front passenger seat. They pulled up next to Alfredo Araujo, another Latin Boys gang member, who was walking home from school. Martinez called to him, "[g]et in the car, you know what we're going to do." Araujo stepped into the Explorer and sat in the rear driver's side seat.

Appellant Rivera drove to a neighborhood shopping center where a Big Saver store was located. The shopping center was in an area claimed as territory by Krazy Proud Criminals (KPC), a rival criminal street gang. Martinez said he wanted to buy razors at the store to shave his head.

After Appellant Rivera drove into the shopping center parking lot, a group of eight or nine KPC members, including Noe de Santiago, approached the Explorer. Someone inside the Explorer asked them, "where they were from." They replied, "KPC." Taking that as a challenge, Appellant Rivera's group replied, "Latin Boys." Martinez said, "let me get off, let me shoot him," referring to Santiago. Appellant Rivera told him no, "I have a better place."

Appellant Rivera drove out of the shopping center parking lot and to another parking lot across the street from the Big Saver store. He stopped the car, and Martinez and Kenneth Rivera got out. From across the street, eight to 10 KPC members came running toward the Explorer. They stopped at the sidewalk across the street from the parking lot where the Explorer was parked and waited for a break in the traffic to cross. Santiago lifted his arms in a challenge. Martinez pulled out a gun and pointed it at

the KPC members. Holding the gun at shoulder height, parallel to the ground, Martinez fired four rounds toward the KPC members across the street.[2] Santiago was hit.

Martinez and Kenneth Rivera stepped back into the Explorer, and Appellant Rivera drove off. Kenneth Rivera told Martinez, "you got him," and Martinez replied, "yeah, I know, I know. I'm going to have to move."

Santiago died from a gunshot wound to his chest.

Police Corporal David Rondou was an investigator in this case and testified as an expert on criminal street gangs. Rondou arrested Appellant Rivera and interviewed him. Appellant Rivera denied any involvement in the shooting and claimed he was with his family at a Chuck E. Cheese's restaurant at the time.

Rondou testified that Latin Boys and KPC are rival criminal street gangs and claim abutting territory in northeast Santa Ana. The shooting in this case occurred in an area claimed by KPC to be part of its territory.

Rondou explained that guns are "prize possession[s] within gangs" and are used both offensively and defensively. A gang member will let other gang members know if he is in possession of a gun. Respect is very important in gang culture and can be earned by committing crimes and violent acts. A gang member would earn the highest form of respect by shooting a rival gang member.

Rondou explained a hit-up occurs when one gang member asks another gang member "where are you from" and is used either as a challenge or a form of identification. Hit-ups commonly occur when two sets of gang members come into contact and sometimes result in violence.

Based on a hypothetical set of facts mirroring those of this case, Rondou testified the shooting was done in association with, and for the benefit of a criminal street

[2] In a police interview, Araujo stated that Santiago lifted his shirt to reveal a dark object, possibly a gun, and that Kenneth Rivera shouted "shoot 'em" to Martinez. At trial, Araujo testified he lied to the police.

gang. The shooting and the killing of a rival gang member benefitted the gang by raising its level of respect: "[T]he word is going to spread out that you don't mess with that gang, they're willing to shoot and kill you if you get in their way. So the respect level through the violence makes the benefit to the gang go up." Rondou also testified the shooting was done to promote, further, or assist criminal conduct by the gang members.[3]

Rondou testified that in the hypothetical, each of the two people who stayed in the vehicle played a role. One served as the getaway driver, and the other served as a backup or lookout.

DISCUSSION

I.

The Trial Court Did Not Err by Declining to Admonish the Jury to Disregard Statements Made by a Prospective Juror.

Martinez argues the trial court erred by declining to admonish the jury to disregard statements made by a prospective juror during voir dire. We find no error.

A. *Background*

During jury selection, the court asked the panel of prospective jurors whether any of them would have difficulty being fair. Prospective Juror No. 231 immediately replied yes, explaining: "I've got an awful lot of friends in law enforcement, have had my whole life. I played softball with a lot of the guys in the Orange County D.A. And in talking to them . . . about their work, a lot of their complaints are that they spend so much time trying to get a case presented, that the ones that finally make it there are usually the rock solid ones. And I tend to agree with them personally. So I'm not sure that by getting to this point that I could be unbiased in coming to a conclusion on what happened." The trial court answered: "You know, it's

[3] Araujo also testified a gang member can earn respect by shooting a rival gang member and the Latin Boys would appear stronger once word spread a Latin Boys gang member had killed a rival gang member.

quite common for jurors not to be persuaded and to acquit people. How do you square that with the experience that you've had talking to prosecutors?" Prospective Juror No. 231 replied: "I'm sure there are outlandish cases that get before a jury. But I think in a case like this, I have no doubt that the prosecutor did an awful lot of homework, and I don't think probably would have brought this case before a jury unless he felt that he had a good shot at winning it."

The court asked whether Prospective Juror No. 231 could be openminded. He replied: "Well, again, if it's a ridiculous case of some sort, I'm sure I could certainly be fair." He added: "And I think a case like this undoubtedly isn't taken lightly, and there's probably been an awful lot of homework. And I don't think the prosecutor is probably rolling the dice hoping he will win this. I imagine he thinks he has a good shot at winning it."

Later during voir dire, defense counsel asked the panel as a whole whether anyone had had a bad experience with gangs or graffiti, "something that happened to them personal[ly], something that happened to a friend, anyone in a personal way that's there?" Prospective Juror No. 231 immediately volunteered this response: "One of my friends who is in law enforcement was in a plain clothes gang unit for L.A.P.D. [¶] . . . [¶] . . . I went on a ride-along with him while he was on patrol, dressed plain clothes. So, the gang members, he was investigating or asking questions about assumed I was probably law enforcement as well because we were dressed alike. He was in an unmarked car, no way to distinguish it, but they knew who he was and there was just a very high level of disrespect. People spitting on the sidewalk as you're driving down the street. And I just had a bad experience that I was kind of, I didn't feel, you know, being treated respectfully."

The trial court sustained defense counsel's challenge for cause to Prospective Juror No. 231. Martinez's counsel then stated: "I'm going to ask something unusual. Number 231 came in with an agenda to pollute jurors, it's obvious to me. That

he just came in here with an agenda to say rock solid cases and stuff. And when he is excused, I'm going to ask the court just to tell the jurors that jurors come in with agendas to make speeches, and they should disregard them." The prosecutor objected to an admonishment.

The trial court agreed Prospective Juror No. 231 made extreme or exaggerated statements to get out of jury duty but did not feel comfortable admonishing the jury because Prospective Juror No. 231 was no worse than other prospective jurors who had said extreme things to get out of jury duty.

B. *Analysis*

Martinez argues Prospective Juror No. 231's remarks took on an "expert like" quality and, without admonishment from the trial court, deprived him of his right to a trial by an impartial jury. A trial court's refusal to dismiss the entire jury panel based upon comments from a prospective juror is reviewed for abuse of discretion under the totality of the circumstances. (*People v. Nguyen* (1994) 23 Cal.App.4th 32, 41-42.) Here, the trial court's refusal to give an admonishment should be reviewed under the same standard.

In this case, the trial court did not abuse its discretion in declining to admonish the jury. The court found that Prospective Juror No. 231 made outlandish or exaggerated statements to get out of jury service, not to taint the jury. The only comments Martinez specifically contends necessitated admonishment were that prosecutors spend a great amount of time preparing cases and bring only "rock solid ones" to trial.[4] Prospective Juror No. 231 did not purport to speak as an expert, and his comments did not take on an expert-like quality; instead, Prospective Juror No. 231

[4] Martinez does not contend an admonishment was necessary for Prospective Juror No. 231's telling of his experience on the police ride-along. No admonishment was needed. Prospective Juror No. 231 was merely answering, directly and forthrightly, the question posed by defense counsel whether any prospective juror had had a bad experience with gangs.

related his own beliefs based entirely on his social contacts with prosecutors. Admonishing the jury may have done Martinez more harm than good by reminding it of Prospective Juror No. 231's comments and emphasizing them.

At the end of trial, the court instructed the jury the defendant is presumed innocent, the prosecution has the burden of proving guilt beyond a reasonable doubt, and the jury must base its decision only on evidence presented in the courtroom and nothing else. We presume the jury followed the trial court's instruction. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.)

In arguing Prospective Juror No. 231's comments deprived him of the right to trial by an impartial jury, Martinez relies on *Mach v. Stewart* (9th Cir. 1998) 137 F.3d 630, 631, a habeas corpus proceeding following the petitioner's conviction for sexual conduct with a minor. During voir dire at the petitioner's trial, a prospective juror stated she had taken psychology courses, worked extensively with psychologists and psychiatrists, and had worked as a social worker for the state for at least three years. (*Id.* at pp. 632-633.) The prospective juror made at least four separate statements that she had never been involved in a case in which a child accused an adult of sexual abuse where that child's statements had not been proven true. (*Id.* at p. 633.) The district court warned the jury pool that jurors must make determinations based on the evidence, then elicited from the prospective juror another statement that she had never known a child to lie about sexual abuse. (*Ibid.*) The district court struck the prospective juror for cause but denied defense motions for a mistrial. (*Id.* at p. 632.)

Reversing the district court's denial of the habeas corpus petition, the Ninth Circuit Court of Appeals concluded: "The error in this case, the jury's exposure during voir dire to an intrinsically prejudicial statement made four times by a children's social worker, occurred before the trial had begun, resulting in the swearing in of a tainted jury, and severely infected the process from the very beginning." (*Mach v. Stewart*, *supra*, 137 F.3d at p. 633.) The error was not harmless, the Ninth Circuit concluded, because the

result of the trial depended primarily on whether the jury believed the child-victim or the petitioner and the prospective juror's comments would have influenced the jury in making the determination. (*Id.* at p. 634.) Because the error required reversal under the harmless error standard, the Ninth Circuit did not decide whether it constituted structural error. (*Ibid.*)

Prospective Juror No. 231, unlike his counterpart in *Mach v. Stewart*, did not purport to speak as an expert and had no training or expertise in law or criminal justice that might have led a juror to believe his opinions carried any weight. Prospective Juror No. 231 expressed his belief, based on his social contacts with prosecutors, that generally only "rock solid" cases made it to trial. Prospective Juror No. 231's comments did not relate to any specific issue at trial and would not have influenced the jurors (if any juror remembered the comments) to resolve an issue in any particular way.

II.

The Trial Court Did Not Error in Admitting Three Photographs Found at Appellant Rivera's House, and Any Error Was Harmless.

Martinez contends the trial court erred by receiving in evidence three photographs found in Appellant Rivera's home. The photographs depicted Appellant Rivera, Martinez, and others in gangster poses, sometimes displaying guns.

A. *Background*

At a pretrial hearing, the prosecution offered eight photographs that were found at Appellant Rivera's home. The court permitted the prosecutor to admit three of them, which were later marked as exhibits 33, 34, and 35. Exhibit 33 depicted Appellant Rivera holding two handguns in a crisscrossed manner. Exhibit 34 depicted Appellant Rivera and Martinez throwing Latin Boys hand signs while another gang member held a weapon. Exhibit 35 depicted Martinez and others beneath the characters "LTBS 13" in gang-style writing. LTBS is an acronym for Latin Boys.

The trial court gave this explanation for receiving those three photographs: "I think they are being offered for substantive evidence, not simply for the foundation of the gang expert's opinion. The People have to show active participation. This shows even if they are not dated close to the time of the crime, ongoing association between the two defendants and other gang members. The fact that they may be for a number of years cuts both ways. It shows a long time association. [¶] In respect to conspiracy and nonconspiracy, the People have to show natural and probable consequences of some kind of altercation was going to be a shooting. And the fact that everyone is flashing guns in the pictures helps to do that. [¶] There's also a question of whether this is true self-defense or not. And the fact that the weapons are being flashed at some other time is some evidence tending to show that it is not. [¶] It also helps the jury see they don't have to take the officer's word for it of the role of guns, the pride in guns, the fact that people share guns and so on. [¶] So, the court feels despite the eloquence of defense counsel, this is pretty standard stuff in a gang case. If they have it, it shows the defendants posing with guns, it's very relevant. And for substantive evidence, not simply for the gang expert's opinion."

After defense counsel asked the trial court to reconsider its ruling, the court stated: "The court has ruled. Photographs under People versus Carey, 41 Cal.4th 109, 126, [Evidence Code section] 352 is evidence which, quote, uniquely tends to evoke an emotional bias against a party and has only slight probative value. This has considerable probative value. A picture is worth a thousand words. They don't have to take Corporal Rondou's opinion. They have photographs."

During trial, the parties stipulated that Appellant Rivera and Martinez were active members of the Latin Boys gang on the date of the shooting. After the stipulation was made, defense counsel renewed objections to the three photographs. The trial court overruled the objections.

B. *Analysis*

Martinez argues the three photographs constituted evidence of character or propensity and therefore were inadmissible under Evidence Code section 1101. The Attorney General argues the photographs were relevant to show Appellant Rivera and Martinez were active participants in the Latin Boys gang when the shooting occurred.

The prosecution was not obligated to accept the stipulation that Appellant Rivera and Martinez were active members of the Latin Boys gang on the date of the shooting and could have chosen instead to prove gang membership with photographs and other evidence. (*People v. Box* (2000) 23 Cal.4th 1153, 1199, disapproved on another ground in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10 [the prosecution "was not obligated to 'accept antiseptic stipulations in lieu of photographic evidence'"].) The prosecutor did accept the stipulation, and, therefore, the Attorney General cannot "plausibly maintain that the introduction of the photograph was needed to demonstrate [Martinez was an active gang member]." (*People v. Ramos* (1982) 30 Cal.3d 553, 577.)

The photographs were relevant nonetheless to corroborate and provide context to Rondou's expert testimony about gang culture and the importance of guns in that culture. The prosecution was not obligated to prove the subjects on which Rondou testified through his testimony alone. (Cf. *People v. Scheid* (1997) 16 Cal.4th 1, 14-15 [photographs admissible to support and corroborate witness testimony regarding circumstances of crime]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1216 [prosecution was not limited to pathologist's testimony but could use photographs to show manner of killing]; *People v. Pride* (1992) 3 Cal.4th 195, 243 [prosecution was not limited to witness's testimony but could also use photographs to show nature and placement of fatal wounds].) Exhibits 33 and 34 corroborated Rondou's testimony that guns are important in gang culture and that gang members will know if another gang member is in possession of a gun. Exhibit 35 corroborated Rondou's testimony that gang members are proud of their gang affiliation.

If the photographs were irrelevant, their admission was harmless under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), which applies to the erroneous admission of photographic evidence.[5] (*People v. Scheid*, *supra*, 16 Cal.4th at p. 21.) "Under the *Watson* standard, the erroneous admission of a photograph warrants reversal of a conviction only if the appellate court concludes that it is reasonably probable the jury would have reached a different result had the photograph been excluded." (*Ibid.*)

It is not reasonably probable the jury would have reached a different verdict if the three photographs were not received in evidence. It was stipulated Appellant Rivera and Martinez were active members of Latin Boys on the day of the shooting, so the photographs did not tell the jury anything it did not already know. (See *People v. Williams* (2009) 170 Cal.App.4th 587, 613 ["We conclude that the error in admitting cumulative gang evidence was harmless under *Watson*"]; *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1054 [error in admission of evidence "'is not prejudicial if the evidence "was merely cumulative or corroborative of other evidence properly in the record"'"].)

III.

The Trial Court Did Not Err by Denying Martinez's Request for Judicial Immunity for Kenneth Rivera or for a Trial Continuance.

Martinez argues the trial court erred by declining to (1) extend judicial immunity to Kenneth Rivera or (2) continue the trial until the time for Kenneth Rivera's appeal had expired.

[5] In the companion case, we reject Appellant Rivera's contention the constitutional standard of *Chapman v. California* (1967) 386 U.S. 18 applies. For erroneous admission of evidence to come within constitutional scrutiny, the trial court must have committed an error that rendered the trial so fundamentally unfair that it violated federal due process. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229-230.) That is decidedly not the case here.

A. *Background*

The amended information charged Kenneth Rivera with murder and conspiracy to commit murder as a codefendant with Appellant Rivera, Martinez, Araujo, and Heriberto Garcia. On November 12, 2008, Martinez's counsel represented he intended to call Kenneth Rivera to testify and requested a determination whether Kenneth Rivera would invoke his Fifth Amendment privilege against self-incrimination. Martinez's counsel stated that if Kenneth Rivera refused to testify, counsel would consider a request for judicial immunity or a trial continuance until Kenneth Rivera was available.

Kenneth Rivera's attorney stated he understood the prosecution did not want to try his client and it appeared the prosecution was willing to give him a disposition agreement of a determinate sentence of 13 to 15 years. The prosecutor stated he wanted to try the case against Appellant Rivera and Martinez before dealing with Kenneth Rivera. After conferring with his client, Kenneth Rivera's counsel announced that Kenneth Rivera would assert his Fifth Amendment privilege and refuse to testify. The parties then stipulated Kenneth Rivera had invoked his Fifth Amendment privilege.

Martinez's counsel asked the trial court to extend judicial immunity to Kenneth Rivera so he could testify as a defense witness. As an alternative, Martinez's counsel asked the court to continue trial until Kenneth Rivera entered into a plea agreement and became available to testify. Martinez's counsel argued (1) the prosecutor was delaying a plea agreement with Kenneth Rivera to make him unavailable as a witness at trial and (2) if the court denied judicial immunity, a continuance was required because Martinez's due process right to present a defense outweighed the interest in finishing trial without interruption. Martinez's counsel explained that Kenneth Rivera's testimony was more favorable than Araujo's because Kenneth Rivera would testify that just before the shooting, he saw a KPC member reach for an object he thought might have been a gun.

The trial court denied the request for judicial immunity, concluding this was not the rare case in which the judicial branch should encroach on the executive branch and grant immunity. The court stated that Kenneth Rivera's testimony was similar to Araujo's testimony, and, therefore, denial of immunity would not deprive Martinez of due process. Martinez's counsel represented he intended to renew the request for immunity at a later time and requested the court mark as an exhibit a transcript of the police interview of Kenneth Rivera. The transcript was marked as exhibit 12. The trial court denied the request of Martinez's counsel for a continuance.

Later, toward the end of trial, the court stated it had read exhibit 12, the transcript of Kenneth Rivera's interview. The court stated: "The court . . . looks at this witness as kind of a mixed bag witness. . . . There's some good things, some bad things in here for the defense. . . . [¶] . . . [T]his is yet another version of the events, some of which helps and some of which hurts the defendant. And the credibility of the declarant is a little bit up in the air. [¶] The police are constantly asking him to tell the truth. He is denying till almost the very end that he is involved with Latin Boys. And I don't see that this meets the extraordinary situation that would cause the court to give or order use immunity."

The jury returned its verdicts on November 20, 2008. On March 6, 2009, before judgment was pronounced, Martinez's counsel informed the court that Kenneth Rivera was still waiting to be tried and there had been no disposition by plea. Martinez's counsel moved for a new trial on the ground the prosecution deprived Martinez of due process and the right to present a defense by deciding to try him before Kenneth Rivera.

B. *Analysis*

1. Judicial Immunity

Neither the California Supreme Court nor any California Court of Appeal has ever recognized the extension of judicial immunity for a defense witness in a criminal case. (*People v. Lucas* (1995) 12 Cal.4th 415, 460 (*Lucas*); *People v. Cooke* (1993) 16

Cal.App.4th 1361, 1371.) In *Lucas*, *supra*, 12 Cal.4th at page 460, the California Supreme Court described as "doubtful" the proposition a trial court has inherent authority to confer immunity on a witness and recognized "'the vast majority of cases, in this state and in other jurisdictions'" had rejected that notion.

In *Lucas*, the court explained the standards for conferring judicial immunity were expressed in *Government of Virgin Islands v. Smith* (3d Cir. 1980) 615 F.2d 964, 972, the one jurisdiction to recognize such judicial authority. The *Lucas* court stated: "The one jurisdiction that recognizes such a power, we have observed, also recognizes that '"the opportunities for judicial use of this immunity power must be clearly limited; . . . the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity . . . . [¶] [T]he defendant must make a convincing showing sufficient to satisfy the court that the testimony which will be forthcoming is both clearly exculpatory and essential to the defendant's case. Immunity will be denied if the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or it is found to relate only to the credibility of the government's witnesses."' [Citation.]" (*Lucas, supra*, 12 Cal.4th at p. 460.) These requirements are "stringent." (*Ibid.*)

Even assuming the trial court had authority to confer immunity, Martinez failed to meet the stringent standard of establishing Kenneth Rivera's testimony would be """clearly exculpatory and essential,""" was unambiguous, and was not cumulative. For purposes of analysis, we will presume the offer of proof made by Martinez's counsel when moving for judicial immunity was substantially the same as the transcript of Kenneth Rivera's police interview marked as exhibit 12. After reviewing exhibit 12, the trial court aptly noted Kenneth Rivera's statements were a "mixed bag" and Kenneth Rivera's credibility was "up in the air." During the interview, Kenneth Rivera told the police that before the shooting, Martinez said, "I'm going to fuck this guy up." Although Kenneth Rivera told the police, "[s]o from what I seen, I could have swore that I saw the

other guy pull out a gun," he did not hear Martinez say that Santiago or any other KPC member had a gun. Kenneth Rivera told the police that Martinez then "fire[d] at the guy" and that he "just keeps firing, like he didn't . . . care anymore. He was just firing, firing, firing and he fired all kinds of rounds." Martinez later bragged about shooting Santiago.

Martinez also failed to show Kenneth Rivera's testimony would have been essential to Martinez's (or to Appellant Rivera's) case. Kenneth Rivera's trial testimony, if consistent with the police interview, would have been nearly the same as Araujo's trial testimony. Araujo testified at trial he saw Santiago lift his arms over his head as a challenge, revealing a dark object. Araujo testified he ducked down in the Explorer when he saw another KPC member reach toward his waist as though reaching for a gun.

Martinez argues Kenneth Rivera's testimony was not cumulative of Araujo's testimony because Kenneth Rivera was at a better vantage point and, being near Martinez, could corroborate Martinez's testimony that one of the KPC members had a silver object in his waistband. Even if that were true, Martinez nonetheless would not have met the stringent requirement of showing Kenneth Rivera's testimony would have been both """clearly exculpatory""" and essential.

2. Continuance

Section 1050, which governs continuances in criminal cases, permits the granting of a continuance "only upon a showing of good cause." (§ 1050, subd. (e).) The good cause requirement applies to trial continuances. (*People v. Santamaria* (1991) 229 Cal.App.3d 269, 277.) Section 1050 expresses the policy that "[t]he welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time." (§ 1050, subd. (a).)

The grant or denial of a motion for a continuance during trial rests within the trial court's discretion. (*People v. Zapien* (1993) 4 Cal.4th 929, 972.) The court must consider the benefit the moving party anticipates receiving; the likelihood a continuance will produce that benefit; the burden on other witnesses, jurors, and the court; and, above

all, whether granting or denying the motion will result in substantial justice. (*Ibid.*) When a defendant seeks a continuance to secure a witness's testimony, the defendant has the burden of showing he or she exercised due diligence to secure the witness's attendance, the witness's expected testimony is material and not cumulative, the testimony can be obtained within a reasonable time, and the facts to which the witness will testify cannot otherwise be proven. (*People v. Howard* (1992) 1 Cal.4th 1132, 1171.)

In reviewing the denial of a defendant's request for a continuance, we consider whether the defendant suffered prejudice. (*People v. Laursen* (1972) 8 Cal.3d 192, 204.) "In the lack of a showing of an abuse of discretion or of prejudice to the defendant, a denial of his motion for a continuance cannot result in a reversal of a judgment of conviction." (*Ibid.*)

Here, the trial court did not abuse its discretion in denying a trial continuance. Martinez failed to show that Kenneth Rivera's testimony could be obtained within a reasonable time. Although it appeared the prosecution was interested in reaching a plea agreement with Kenneth Rivera, there was no indication whether or when that deal would be reached. If no deal were reached, and Kenneth Rivera were tried, he might not be available to testify for years if he was convicted and asserted his Fifth Amendment rights during the appeal. "[T]here was no guarantee whatsoever that [Kenneth Rivera] would not continue to invoke his privilege against self-incrimination during the pendency of his appeal." (*People v. Mendoza* (1992) 8 Cal.App.4th 504, 515.)

Martinez argues the trial court should have granted a continuance "to thwart the prosecutor from manipulating the order of trials" by delaying efforts to reach a plea agreement with Kenneth Rivera. In addressing judicial immunity, the trial court found the prosecution was not denying use immunity to a witness to distort the factfinding process. As there is no evidence regarding the plea negotiations (if any), it cannot be determined whether the prosecution was delaying or whether Kenneth Rivera was

demanding terms to which the prosecution was not willing to agree. As in many settlement negotiations, it is difficult or impossible to determine why an agreement had not been reached.

The trial court in this case considered the burden of a continuance on other witnesses, the jurors, and the court, and concluded a continuance would not be "practical" or "realistic." Martinez has provided no reason to question that conclusion.

The California Constitution and the Penal Code guarantee the people of the State of California the right to a speedy trial. (Cal. Const., art. I, § 29; Pen. Code, § 1050, subd. (a).) We conclude the trial court did not abuse its discretion in denying a trial continuance.

IV.

The Trial Court Did Not Err by Denying Martinez's Request to Instruct the Jury That the Prosecutor Asked a Question in Deliberate Violation of a Court Order.

Martinez argues the trial court erred by denying his request to instruct the jury that the prosecutor violated a court order by asking a witness an improper question. The court found the prosecutor had "evaded" the order but believed reprimanding the prosecutor before the jury was "going too far." Instead, the court admonished the jury to disregard the improper question and later instructed the jury that counsel's statements and questions were not evidence.

We conclude the trial court did not abuse its discretion in selecting the remedy of admonishment, admonishment was sufficient to cure the misconduct, and, in any event, the asserted prosecutorial misconduct was harmless.

A. *Background*

Appellant Rivera, Martinez, Araujo, Kenneth Rivera, and Garcia were charged in count 1 of the amended information with first degree murder. Count 3 of the

amended information charged only Araujo and Garcia with making criminal threats to the victim, Santiago.

At the beginning of trial, outside the jury's presence, the prosecutor asked for the court's permission to call a witness to testify that several weeks before the shooting, Araujo and Garcia made threats against Santiago. Specifically, the prosecutor offered to prove that, on one occasion, Araujo and Garcia drove past Santiago's apartment in a Ford Explorer and Garcia made a throat-slashing gesture toward Santiago, and that, on another occasion, Araujo and Garcia chased Santiago around the area of his apartment and Garcia made another throat-slashing gesture toward Santiago. During the latter incident, Araujo told a witness, "you cannot save his life today."

Martinez's counsel objected to the prior threats evidence on the grounds there was no connection between Martinez and the threats, there was no proof he was aware of the threats, and the conspiracy charges against Garcia had been dismissed. The trial court denied the prosecution's request without prejudice with the intent "to revisit it when the court has a better feel for the case."

During redirect examination of Araujo, the prosecutor asked: "As a matter of fact[,] days prior to the, to when [Santiago] was killed in this case you and [Garcia] threatened [Santiago], didn't you?" Martinez's counsel objected and requested a chambers conference. In chambers, the court asked the prosecutor whether the question was directed to the throat-slashing gestures. When the prosecutor agreed it was, the court said, "[y]ou should give us some warning about that." Martinez's counsel argued the prosecutor intentionally disregarded the court's denial of the prosecution's request to elicit testimony about the prior threats. In response, the prosecutor stated he did not believe the court's ruling applied to questioning Araujo.

After hearing extensive argument, the trial court concluded the prosecution should have asked for a hearing before asking Araujo about the prior threats. The court stated: "I will tell the jury that I'm sustaining the objection to the question, it was an

improper question. I'm not going to reprimand [the prosecutor] in front of the jury. I think that's going too far."

The court then told the jury: "The last question if you remember it, ladies and gentlemen, is stricken. It was an improper question. It should never have been asked. And I'm asking you to disregard and not consider it for any purpose." During jury instruction, the court instructed the jury that nothing the attorneys might say is evidence and questions are not evidence.

B. *Analysis*

In order to prevail on a claim of prosecutorial misconduct, the appellant must show that the prosecutor's behavior amounts to a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Harris* (1989) 47 Cal.3d 1047, 1084.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct only if it involves deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

Although the prosecutor did not engage in a pattern of egregious conduct, the trial court found the prosecutor had "evaded the court's ruling" by asking Araujo the question about prior threats. As a remedy, the trial court properly exercised its discretion by promptly admonishing the jury to disregard the question. (See *People v. Fitzgerald* (1972) 29 Cal.App.3d 296, 312.)

"'It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove any effect his conduct or remarks would otherwise have.'" (*Horn v. Atchison, T. & S. F. Ry. Co.* (1964) 61 Cal.2d 602, 610.) This was not the extreme case where some further sanction was warranted. The prosecutor's question was a single incident. The trial court had made the decision to deny the prosecution's request to present testimony about the prior threats and

was in a better position than we are to determine any degree of misconduct and the appropriate remedy. As the trial court found the prosecutor had *evaded* the prior order, an instruction or reprimand that the prosecutor had *violated* the order would have been, as the court stated, "going too far." We find no abuse of discretion in the trial court's choice of admonishment as the appropriate remedy.

The trial court clearly, directly, and forcefully admonished the jury to disregard the prosecutor's question regarding prior threats. We presume the jury followed the admonishment. (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.) At the end of trial, the court instructed the jury that neither questions nor anything the attorneys might say constitutes evidence. We presume too the jury followed the court's instructions. (*People v. Boyette*, *supra*, 29 Cal.4th at p. 436.)

Martinez argues the presumption the jurors followed the admonishment and instruction was rebutted by the jury's purported failure to follow an instruction that the jury was to decide the special circumstance instruction only if the jury found him guilty of first degree murder. The jury found Martinez guilty of second degree murder but still returned a true finding on the special circumstance allegation. Martinez contends this jury error shows the jurors did not follow instructions. This single mistake does not rebut the presumption the jury followed the admonishment and all the other instructions in the case.

Finally, Martinez can show no prejudice from the prosecutor's improper question. Prosecutorial misconduct is cause for reversal only when it is "'reasonably probable'" the defendant would have received a more favorable result had the misconduct not occurred. (*People v. Milner* (1988) 45 Cal.3d 227, 245.) The prosecutor asked a single improper question in the course of a lengthy trial. The court admonished the jury not to consider the question. The purpose of the prior threats evidence would have been to show premeditation and conspiracy to commit murder, yet the jury convicted Martinez of second degree murder (and Appellant Rivera of involuntary manslaughter). It was

uncontroverted that Appellant Rivera and Martinez were active members of Latin Boys, that Santiago was a member of KPC, that Latin Boys and KPC were rival gangs, and that members of rival gangs commit acts of violence against each other.

V.

The Trial Court Did Not Err by Instructing the Jury with CALCRIM No. 3472.

Martinez argues the trial court erred by instructing the jury with CALCRIM No. 3472, which states: "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force." Martinez does not contend CALCRIM No. 3472 is incorrect as to the law; instead, he contends that instruction was not supported by the evidence because his conduct did not legally justify an attack by the KPC gang members.

In addition to CALCRIM No. 3472, the trial court instructed the jury with CALCRIM No. 505 (justifiable homicide: self-defense or defense of another) and CALCRIM No. 571 (voluntary manslaughter: imperfect self-defense—lesser included offense). On the morning of the second day of deliberations, the jury presented a question asking, "[h]ow does CALCRIM 3472 apply to <u>imperfect</u> self-defense (voluntary manslaughter)?" Martinez's counsel objected to rereading CALCRIM No. 3472 and asserted the instruction did apply to imperfect self-defense. The court responded to the jury's question by quoting CALCRIM No. 3472 with the statement, "CALCRIM 3472 does apply to imperfect self defense."

"Giving an instruction that is correct as to the law but irrelevant or inapplicable is error." (*People v. Cross* (2008) 45 Cal.4th 58, 67.) "Nonetheless, giving an irrelevant or inapplicable instruction is generally '"only a technical error which does not constitute ground for reversal."'" (*Ibid.*)

Martinez argues CALCRIM No. 3472 is applicable only when a defendant provokes a fight or quarrel through wrongful—i.e., unlawful—conduct. The instruction was inapplicable because, according to Martinez, the jury rejected the charge of premeditated murder and he did not engage in any unlawful conduct to provoke a fight.

CALCRIM No. 3472 itself does require provocation by wrongful conduct: It denies the right of self-defense if the defendant "*provokes* a fight or quarrel" to create an excuse for using force. (Italics added.) As authority for the instruction, CALCRIM No. 3472 cites , in this order, *People v. Olguin* (1994) 31 Cal.App.4th 1355 (*Olguin*); *Fraguglia v. Sala* (1936) 17 Cal.App.2d 738, 743 (*Fraguglia*); and *People v. Hinshaw* (1924) 194 Cal. 1 (*Hinshaw*).

In *Olguin*, *supra*, 31 Cal.App.4th at page 1366, three gang members, Cesar Javier Olguin, Francisco Calderon Mora, and Jesse Hilario, decided to find out who had defaced their gang's graffiti. When they encountered Eugene Hernandez and Robert Ulloa, Mora asked Hernandez if he belonged to a rival gang and if he knew who had defaced the graffiti. (*Ibid.*) Hernandez denied gang membership and said a relative of his had crossed out the graffiti. (*Ibid.*) Olguin, Mora, and Hilario walked away. At that moment, Hernandez's cousins, April Martinez and John Ramirez, walked by and Hernandez told them what had happened. (*Ibid.*) Ramirez walked past Hernandez and, following Olguin, Mora, and Hilario, yelled the rival gang's name. (*Id.* at pp. 1366-1367.) Olguin, Mora, and Hilario turned around and approached Ramirez while yelling the name of their gang. (*Id.* at p. 1367.) Ramirez confronted them at arm's length as the yelling continued. (*Ibid.*) Mora punched Ramirez in the face, knocking him down. As Hernandez and others moved toward Ramirez to help him, Ramirez got up and walked toward Olguin, Mora, and Hilario. (*Ibid.*) Olguin pulled a gun from his waistband and fired, killing Ramirez. (*Ibid.*)

Mora argued the trial court erred by giving CALJIC No. 5.55, the predecessor to CALCRIM No. 3472, because it was inapplicable to the facts of the case.[6] (*Olguin, supra,* 31 Cal.App.4th at p. 1381.) The *Olguin* court agreed, stating without explanation that the instruction "had no antecedent in the facts of this case," but concluding that giving the instruction was harmless error. (*Ibid.*) The *Olguin* court did not comment whether the instruction was applicable only when the defendant engaged in wrongful conduct in seeking a quarrel. The instruction apparently was inapplicable to the facts of the case because Mora did not seek a quarrel with Ramirez; rather, Ramirez approached Mora, Olguin, and Hilario after speaking with Hernandez.

In *Fraguglia, supra,* 17 Cal.App.2d at page 743, the court approved an instruction stating: "'The law does not permit any person to voluntarily seek or invite a combat, or to put himself in the way of being assaulted, with the purpose that he may have a pretext to injure his assailant. The right of self-defense does not imply the right of attack, and it will not avail in any case where the difficulty is set off and induced by the party, by any wilful act of his, or where he voluntarily and of his own free will enters into it. The necessity being of his own creation, will not operate to excuse him.'"

In *Hinshaw, supra,* 194 Cal. at page 26, the court stated: "There is no foundation for the assertion that by instruction d the jury was practically charged that appellant 'started this fight with the premeditation beforehand to make a felonious assault.' The instruction is given in the abstract and correctly states the recognized principle of law 'that self-defense is not available as a plea to a defendant who has sought a quarrel with the design to force a deadly issue and thus, through his fraud, contrivance or fault, to create a real or apparent necessity for making a felonious assault.'"

[6] CALJIC No. 5.55 stated: "The right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense." (See *Olguin, supra,* 31 Cal.App.4th at p. 1381, fn. 10.)

Neither the *Fraguglia* court nor the *Hinshaw* court stated or concluded the instruction was applicable only when the defendant engaged in wrongful conduct in seeking a quarrel. Those cases require only that the defendant sought, provoked, or invited the quarrel with the intent of creating a pretext for attacking the assailant.

Martinez relies on *In re Christian S.* (1994) 7 Cal.4th 768 (*Christian S.*) and *People v. Seaton* (2001) 26 Cal.4th 598 (*Seaton*). The issue in *Christian S.* was whether 1981 amendments to the Penal Code abolished the doctrine of imperfect self-defense. (*Christian S.*, *supra*, 7 Cal.4th at p. 771.) In explaining that doctrine, the court stated: "It is well established that the ordinary self-defense doctrine—applicable when a defendant *reasonably* believes that his safety is endangered—may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified. [Citations.] It follows, a fortiori, that the imperfect self-defense doctrine cannot be invoked in such circumstances. For example, the imperfect self-defense doctrine would not permit a fleeing felon who shoots a pursuing police officer to escape a murder conviction even if the felon killed his pursuer with an actual belief in the need for self-defense. (*Id.* at p. 773, fn. 1.)

In *Seaton*, *supra*, 26 Cal.4th at page 664, the defendant argued the trial court erred by denying his request to instruct the jury on unreasonable self-defense. The defendant pointed to his testimony that after he struck the victim with his fist, the victim wielded a hammer, which defendant then wrested from the victim and used to attack the victim. (*Ibid.*) He asserted he attacked the victim with the hammer in an effort to protect himself. (*Ibid.*) Citing *Christian S.*, the Supreme Court concluded, "[b]ecause, however, defendant's testimony showed him to be the initial aggressor and the victim's response legally justified, defendant could not rely on unreasonable self-defense as a ground for voluntary manslaughter." (*Seaton*, *supra*, 26 Cal.4th at p. 664.)

Martinez argues the quoted passages from *Christian S.* and *Seaton* support the principle that CALCRIM No. 3472 applies only when the defendant engages in wrongful conduct to provoke a quarrel. But neither the *Christian S.* court nor the *Seaton* court construed CALCRIM No. 3472 or its predecessor; instead, footnote 1 from *Christian S.* and the conclusion in *Seaton* address the right to self-defense by an initial aggressor, which is the subject of CALCRIM No. 3471 and CALJIC No. 5.54. We do not interpret *Christian S.* or *Seaton* as limiting CALCRIM No. 3472 to provocation by wrongful conduct.

The evidence in this case supported giving CALCRIM No. 3472. During the afternoon of September 17, Appellant Rivera drove up alongside Araujo and told him to get inside because "you know what we're going to do." Appellant Rivera then drove into rival gang territory, where he, Martinez, Araujo, and Kenneth Rivera confronted rival gang members by engaging in a hit-up. Rondou testified a hit-up is a challenge and a sign of disrespect that can lead to violence. Martinez asked then and there to be let out of the car so he could shoot Santiago, but Appellant Rivera said he had a better place to go. Rather than leave the area to avoid conflict, Appellant Rivera drove across the street to another parking lot to await an anticipated attack from KPC members. From this evidence, a reasonable jury could find that Martinez and the other Latin Boys members drove into territory claimed by KPC and, by means of a hit-up, provoked a quarrel with KPC members with the intent of creating an excuse to use force against them.

VI.

There Was No Cumulative Error.

Martinez argues he suffered prejudice from cumulative error. As we have found no error, "[t]here was . . . no error to cumulate." (*People v. Phillips* (2000) 22 Cal.4th 226, 244.)

VII.

The Judgment Is Ordered Modified to Impose Concurrent Sentences on the Determinate and Indeterminate Terms.

Martinez argues the judgment must be modified so that the determinate term for street terrorism (§ 186.22, subd. (a)) runs concurrently with, rather than consecutively to, the indeterminate term for murder.

The jury convicted Martinez of one count of second degree murder, carrying a sentence of imprisonment for a term of 15 years to life. (§ 190, subd. (a).) The jury found true the allegations the crime was committed for the benefit of or in association with a criminal street gang, subjecting Martinez to a minimum parole eligibility period of 15 years. (*Id.*, § 186.22, subd. (b)(5).). The jury also found true a firearm use enhancement under section 12022.53, subdivision (d), which carries an enhancement of 25 years to life in prison. The jury also convicted Martinez of street terrorism under section 186.22, subdivision (a), which is punishable by a determinate term of 16 months, two years, or three years (*ibid.*).

Section 669 provides that if a defendant is convicted of two or more offenses, the trial court "shall direct whether the terms of imprisonment . . . shall run concurrently or consecutively." If the trial court exercises its discretion to run a determinate term consecutively to another term, the court must state on the record "the primary factor or factors that support the exercise of discretion." (Cal. Rules of Court, rule 4.406(a).)

At the sentencing hearing, the trial court sentenced Martinez to a total sentence of 40 years to life for the second degree murder conviction and the use of a firearm enhancement. The court imposed a determinate two-year sentence for the street terrorism conviction and initially decided to "run it concurrent to the indetermina[te] sentence." The prosecutor argued a determinate sentence could not be run concurrently with an indeterminate life sentence. The trial court then stated: "That may be correct.

When I did this I thought maybe that would be appropriate. I don't see adding another two years if I were the decision-maker, but maybe the law requires that." Ultimately, the court decided to run the two-year determinate sentence consecutively to the indeterminate sentence but stated, "for the record[,] I wouldn't normally do that."

The Attorney General concedes, "[t]he trial court was mistaken in its belief that it had no discretion whether to impose concurrent or consecutive terms for the determinate and indeterminate terms." While Martinez argues we direct the modification of the judgment to reflect a concurrent sentence on the street terrorism conviction, the Attorney General argues the matter should be remanded for the trial court to exercise its discretion in deciding whether to make that sentence run concurrently or consecutively.

We agree with Martinez and direct modification of the judgment to impose sentence on the street terrorism conviction concurrently to the sentence on the murder conviction. The trial court initially decided to run the determinate sentence concurrently with the indeterminate sentence. The court imposed consecutive sentences only because the prosecutor convinced the court that imposing concurrent sentences was not legally permissible. The court stated it would impose concurrent sentences "if I were the decision-maker" and would not usually impose consecutive sentences. The trial court was not required to state reasons on the record for directing concurrent sentences: California Rules of Court, rule 4.406(b) states that sentencing choices generally requiring a statement of reasons include imposing consecutive sentences but not concurrent ones. Remanding the matter would be an "idle and unnecessary, if not pointless, judicial exercise" because we know precisely how the trial court in this case would exercise its discretion in deciding between consecutive and concurrent sentences. (*People v. Coelho* (2001) 89 Cal.App.4th 861, 889.)

VIII.

The Judgment on the Determinate Term Is Ordered Amended to Include Actual Custody Credit.

The trial court granted Martinez 1,491 days of actual custody credit for the entire sentence. The custody credit appears on the abstract of judgment for the determinate term on the street terrorism conviction, but not on the abstract of judgment for the indeterminate term on the murder conviction. Martinez argues the abstract of judgment on the indeterminate term for the murder conviction must be amended to reflect actual custody credit. The Attorney General does not object to so amending the abstract of judgment.

Amending the abstract of judgment for the indeterminate sentence to add the actual custody credit is appropriate, in particular because we are directing the determinate sentence for the street terrorism conviction to run concurrently with the indeterminate sentence for murder.

IX.

The True Finding on the Special Circumstance Murder Allegation Is Vacated.

Martinez argues the trial court should have vacated the jury's true finding on the special circumstance allegation of murder committed for a criminal street gang purpose (§ 190.2, subd. (a)(22)) because that allegation became inapplicable when the jury found him guilty of second degree murder. The Attorney General agrees.

A special circumstance under section 190.2 applies only when a defendant is convicted of first degree murder. (§ 190, subd. (a).) We direct that the true finding on the special circumstance allegation under section 190.2, subdivision (a)(22) be vacated.

DISPOSITION

The judgment is modified to impose concurrent sentences on the determinate and indeterminate terms and to credit Martinez with 1,491 days' actual

custody credit on the indeterminate term. The jury's true finding on the special circumstance murder allegation is ordered vacated. As modified, and in all other respects, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and forward a certified copy of it to the Department of Corrections and Rehabilitation.

FYBEL, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.